JD(SF)-22-05
Redmond, Washington

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

PERFECT CLIMATE, INC.
The Respondent

and **Cases 19-CA-29256**
19-RC-14517

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL NO. 66, AFL-CIO
The Charging Party

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SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL NO. 66, AFL-CIO
The Charging Party

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DECISION AND RECOMMENDATION ON CHALLENGED BALLOTS

Statement of the Case

CLIFFORD H. ANDERSON, Administrative Law Judge: I heard the above-captioned case in trail on December 9, 10 and 11, 2004, in Seattle, Washington. The matter arose as follows. On May 18, 2004, the Sheet Metal Workers International Association, Local No. 66, AFL-CIO, (the Charging Party or the Petitioner or the Union) filed a charge docketed as Case 19-CA-29256 against Perfect Climate, Inc. (the Respondent or the Employer) and amended that charge on May 27, 2004. The Regional Director for Region 19 issued a complaint respecting the charge on September 28, 2004, and the Respondent filed a timely answer thereto.

The complaint alleges and the answer denies that the Respondent in May 2004 engaged in various conduct in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). The complaint further alleges and the answer denies that the Respondent discharged employee James Cooke on May 17, 2004 and in May 2004 demoted, issued oral warnings to, and discharged employee David Zimmerman, in violation of Section 8(a)(3) and (1) of the Act.

On May 11, 2004, the Petitioner filed a Representation Petition docketed as Case 19–RC-14517 seeking to represent certain employees of the Employer. Pursuant to a Stipulated Election Agreement approved by the Regional Director on May 21, 2004, and amended on May 26, 2004, an election by secret ballot was conducted on June 16, 2004, in the following unit of employees of the Employer:

All journeymen, apprentices and trainees engaged in sheet metal fabrication and installation who are employed by the Employer at or out of its Redmond, Washington facility excluding office clerical employees, managerial employees, guards and supervisors as defined in the Act.

The Tally of Ballots served upon the parties on or about June 18, 2004, provided that of approximately five eligible voters, there were seven challenged ballots and no other ballots cast. The Regional Director initiated a preliminary investigation of the challenged ballots. On September 28, 2004, the Regional Director issued a Report and Recommendation on Challenged Ballots and Direction of Hearing in which he determined that the challenged ballots raised substantial and material issues of law or fact, including credibility resolutions, which could be best resolved at a hearing and directed a hearing be held on the challenged ballots.

On September 28, 2004, the Regional Director for Region 19 also issued an Order Consolidating Cases and Notice of Consolidated Hearing on Challenged Ballots consolidating Cases 19-CA-29256 and 19-RC-14517 for hearing and decision by an administrative law judge.

Findings of Fact

Upon the entire record[1] herein, including helpful briefs from the Respondent, the Charging Party and the General Counsel, I make the following findings of fact.[2]

I. Jurisdiction

The Respondent is a State of Washington corporation with an office and place of business in Redmond, Washington, where it is engaged in the business of heating, ventilation, and air conditioning installation and fabrication. During all relevant periods, the Respondent annually enjoyed gross revenues in excess of $500,000 and purchased and received goods valued in excess of $50,000 directly from suppliers outside the State of Washington.

Based on the above, there is no dispute and I find the Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

The record establishes, there is no dispute, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

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[1] The General Counsel's unopposed motion to amend the transcript to correct various negligent reporting errors is granted. Among the unopposed corrections moved is the correct spelling of counsel's name, the correction of the names of counsel representing various parties and the substitution of the correct name of the trial judge for the name of another judge not associated with this proceeding. The need for these corrections suggests the transcript was incompetently prepared and issued without effective review. The General Counsel is requested to provide appropriate feedback to the reporting service and the Agency's contracting officers.

[2] As a result of the pleadings and the stipulations of counsel at trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

III. The Alleged Unfair Labor Practices

A. Background

The Employer is engaged in the business of heating, ventilation and air conditioning installation and fabrication primarily as a subcontractor in retail construction projects. Its president and owner is Mr. Paul Joseph. The Employer operates from a shop in the garage at Mr. Joseph's Redmond Washington residence. Generally during the relevant time period, the Employer worked on 2 or 3 jobs at any one time doing necessary fabrication at the shop and installing equipment at the jobsites. To do the work, the Employer employed sheet metal workers.

The Union represents sheet metal workers. In early 2004 it selected the Employer for an organizing campaign and in time sent two individuals to obtain employment with the Employer and soon thereafter obtained the support of a third employee, paying those three the difference between the wages earned as employees of the Employer and the union scale wage for like work. Mr. James Cooke worked from January 2004 until his termination on May 17, 2004. Mr. David Zimmerman worked from February 2004 until his termination on May 26, 2004. Mr. Marquis Smith worked from April 2004 until he quit on June 17, 2004.

On May 11, 2004, the Union filed its representation petition, on the same day faxed the Employer a letter demanding recognition from the Employer based on having "obtained Authorization Cards from a majority of the employees. . ." and again on the same day visited the Joseph home speaking to Ms. Joseph. On May 13, 2004, the Union faxed a second letter to the Employer informing it that an organizing committee had been formed comprising the three employees named above.

B. Evidence[3] Concerning the Allegations of the Complaint

The complaint alleges a series of unfair labor practices occurring in May 2004. They are best presented as follows.

1. Complaint Paragraph 5 – Alleged Interrogations by Joseph

Complaint subparagraph 5(a) alleges that on or about May 11, 2004, Mr. Paul Joseph interrogated an employee about a petition filed by the Union. Complaint subparagraph 5(b) alleges that on or about May 11, 2004, Joseph interrogated an employee about the employees thoughts about the Union. This conduct is alleged at complaint paragraph 8 to violate Section 8(a)(1) of the Act.

Mr. David Zimmerman testified that Mr. Joseph telephoned him on the afternoon of the day that the Union's demand letter had been delivered to the Employer. Zimmerman described the conversation:

> [Mr. Joseph] said that he [ha]d been visited by representatives of the union and that they had filed the paperwork to have the shop go union and asked if I knew anything about it. . . . I lied, I said no. He had said, he said that there was no way he was gonna, the

[3] Not all evidence introduced into evidence and advanced in support of the parties' positions is set forth or summarized herein although the record in its entirety was considered in reaching the conclusions herein.

> shop would go union and that he was gonna call and ask James if he knew anything about it.

Mr. Marquis Smith testified to a brief conversation alone with Joseph, without confidently identifying the precise date of its occurrence, but identified it as occurring hard upon the Union's initial communication with the Employer and likely the following day:

> Yes. I started loading up the vans to get ready for work that day and I had to go out to my personal truck and on my way out there Mr. Joseph drove up near where I was and asked me if I was for the union. . . . I said yes, I am.

Mr. Joseph denied talking to either Zimmerman or Smith about the Union or asking their views. He testified that he learned from his wife by telephone of the Union's agents' visit to his home earlier that day and of the Union's facsimile transmission communication to his home. His wife was not able to completely communicate the details of the Union's position to him, he recalled, and Joseph himself, reading the documents at his home that evening, remained somewhat at a loss respecting the meaning and consequences of the events. He testified the following day he initially sought advice from his accountant and was referred to and finally came to talk to counsel respecting his circumstances and was counseled, among other things, not to talk to employees about the Union.

The General Counsel advances the credibility of its accusing witnesses. Further, counsel for the General Counsel argues on brief that May 11 and 12 were times before the May 13th delivery of the Union letter identifying Smith, Zimmerman and Cooke as union supporters. Thus, counsel for the General Counsel argues on brief, it was logical in the confusion of the time that Joseph should interrogate his employees about their union activities and sympathies in an attempt to learn which employees supported the Union.

2. Complaint paragraph 6 – Promulgation of New Rules

Complaint subparagraph 6(a)(i) alleges that on or about May 14, 2004, the Respondent put in place and thereafter maintained a policy prohibiting smoking in its shop and vans. Complaint subparagraph 6(a)(ii) alleges that on or about May 16, 2004, the Respondent put in place and thereafter maintained a new dress code whereby only Respondent-issued shirts could be worn by employees. Complaint subparagraph 5(b) alleges that the implementation and maintenance of the rules described above were initiated to discourage employees from joining or forming a union or engaging in other concerted activities. This conduct is alleged at complaint paragraph 9 to violate Section 8(a)(1) of the Act.

The Respondent's answer admits that it maintained a no smoking policy in its shop but denied that the policy was implemented at the time alleged. The Respondent denied generally that it had a no-smoking policy for company vans or a dress code policy that required only Respondent issued shirts be worn.

a. Evidence Respecting Smoking Rules

Mr. Marquis Smith testified that before the election petition was filed, there was no prohibition respecting smoking in the shop and that he had observed employee James Cooke smoking in Joseph's presence on several occasions. But, he recalled, the morning after the petition was filed and the Employer was made aware of the Union efforts, Joseph announced to the employees in the shop – Zimmerman, Cooke, perhaps Leland Simmons, and himself -- that

they were no longer allowed to smoke in the shop, company vehicles or on the jobsites and that were only allowed to smoke on our breaks and at lunch.

Mr. Leland Simmons, a cigarette smoker at relevant times and long-term employee testified that he knew of no policies respecting smoking save that there was to be no smoking in the shop. He did recall however that after the petition was filed, Zimmerman was in the company van with him and told him that Zimmerman guessed there was to be no smoking in the vans, but then told Simmons to go ahead and smoke, that he did not mind.

Mr. James Cooke, also a cigarette smoker at relevant times, testified that he was a regular smoker and smoked in both the shop and in company vehicles. He testified that Joseph had never told him not to smoke in the shop. Indeed he recalled that Joseph had told him to avoid throwing cigarette butts about and had provided him an electrical junction box to use as an ashtray when smoking in the shop.

A few days after the petition was filed, Cooke testified that Joseph announced to the employees in the shop that "we could no longer smoke in, in the vehicles or in the shop, we could step outside and smoke out the shop door, the shop to the door." Cooke recalled that Joseph said that he had found a cigarette butt outside or stepped on one. After that announcement, Cooke testified, he no longer smoked either in the company shop or company vehicles. He also observed that Scott Simmons, who had smoked in the shop prior to the restriction, thereafter did not. Simmons did, however, occasionally smoke in the vans after the announcement.

Mr. David Zimmerman testified that he recalled a conversation with Leland Simmons after the no-smoking policy was implemented. Zimmerman recalled Simmons and he were driving some distance to a job together in the company van and Simmons told him that it was going to be a long trip and since smoking was no longer allowed in the company vehicles, could they stop for a smoking break. Zimmerman responded that he did not object to Simmons smoking in the van.

Mr. Paul Joseph testified that he had long required that employees smoke by the door of the shop with the door open so that there was ventilation in light of the flammable materials in the shop. He did not exclude smoking entirely from the structure because there was no covered area outside the shop. Scott Simmons corroborated Joseph that there was no smoking allowed in the shop

b. Evidence Respecting Dress Code

There is no dispute that prior to May 26, 2004, the Employer did not require employees to wear a company shirt and that all employees could wear personal clothing to work. Employees Zimmerman and Smith were provided by the Union with union shirts at a jobsite meeting on May 12 and thereafter wore them to work. Thereafter Cooke also began wearing union shirts to work. There is also no dispute that the company did have company shirts that were worn at least by Mr. Joseph prior to May 26.

Mr. Joseph testified that he had long had company shirts and jackets for himself and his employees, but did not insist on the employees wearing them. When the employees first began wearing union shirts, he ordered additional company shirts. When the shirts arrived, Joseph provided them to Scott Simmons for distribution to employees.

Mr. Scott Simmons testified that sometime between Zimmerman's termination on May 26, 2004, and the June 16, 2004 election, Joseph provided him with shirts for himself and other employees and told him he wanted the employees to wear the shirts. Scott Simmons then distributed the shirts to employees. Scott Simmons testified he told the employees when he passed them out that they were company shirts and that Joseph wanted the employees to wear them to work.

Mr. Marquis Smith testified that the day Zimmerman was terminated he was at a jobsite with fellow worker Mark Simmons, brother of Scott, when Scott Simmons arrived wearing a company shirt, gave each employees company shirts and told them: "there's a new company policy now and only company T-shirts can be worn." In response Smith took off his union shirt and put on the company shirt. Mark Simmons put on the company shirt as well. Mr. Mark Simmons recalled receiving the shirts with Smith and being told by Scott Simmons that: "Paul [Joseph] wanted you to wear the T-shirts if you were out there representing his company." Mark Simmons thereafter only wore the company shirts.

3. Complaint paragraph 7 – May 2004 Discrimination Against Employees Cooke and Zimmerman

The complaint at sub paragraph 7(a) alleges that the Respondent on or about May 17, 2004, discharged employee James Cooke. Sub-paragraph 7(c) alleges that this conduct occurred because the employees assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities. Complaint subparagraph 7(b) alleges a series of adverse actions in May 2004 against employee David Zimmerman including his demotion on May 13, issuance of oral warnings on May 13, 17, and 20, and discharge on May 26, 2004. Subparagraph 7(c) alleges that this conduct occurred because the employees assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities. This conduct is alleged at complaint paragraph 9 to violate Section 8(a)(3) and (1) of the Act.

a. Employee James Cooke

Mr. James Cooke, a sheet metal worker with approaching 30 years experience, was employed by the Employer as a sheet metal worker in January 2004. It appears that throughout his employment as well as at the time of his pre-hire interview with Joseph, Cooke did not possess a valid drivers' license. He did however always drive to the shop in his own automobile and either rode with others in the company van or drove his own vehicle to jobsites. He did not however drive the Employer's vans.

Mr. Cooke testified that during the pre-hire process and in his initial hire and work period with the Employer, he was not asked and did not tell Joseph that he did not have a driver's license. The fact that he did not have a driver's license first came up, in Cooke's recollection, in March 2004 when Joseph asked Cooke to drive a company van to pick up job materials and Cooke told Joseph that he did not have a driver's license. Joseph told Cooke at that time that he probably needed to get his drivers' license.

Cooke testified that he then embarked on obtaining a license in Washington state but discovered he had a suspended license in South Carolina which complicated the process. Cooke testified that he then began a bureaucratic odyssey directed toward obtaining a drivers' license. Cooke testified he reported to Joseph his various efforts and steps undertaken to deal with the South Carolina situation and clear up the legal impediments to obtaining a Washington state license. Cooke recalled these conversations took place in a non-confrontational indeed

friendly, manner over several conversations in the weeks and months following the original March conversation.

On Thursday May 12,[4] Cooke testified that he was telephoned on a jobsite by Joseph who told him, for the first time: "I had to have a driver's license by the following Monday or I'd be terminated." Cooke characterized Joseph's tone as angry. That following Monday, May 17, 2004, when Cooke came to work, Joseph asked him if he had obtained a driver's license and Cooke told him no. Joseph told Cooke he was terminated and to collect his tools and leave and Cooke did so.

Mr. Zimmerman testified that on an irregular basis he recalled being present when in conversation, Joseph would ask Cooke about his progress towards obtaining a drivers' license and Cooke would tell Joseph that he had as yet not obtained one but was working on it. Zimmerman also testified that he had a conversation with Joseph on one of Scott Simmons's first days of employment in late April or early May, by telephone.

> I called [Mr. Joseph] to tell him how the job had gone that day and to let him know that I was gonna be coming in early to load my truck because I was, I had made agreements to go pick Scott [Simmons] up at home and take him, bring him so he wouldn't have to drive in because he didn't have a driver's license. . . .Well, [Joseph] said he knew -- he said thanks, that's a good thing. I had told him that I wasn't gonna charge him for the time to drive -- to go over and pick him up and he said, you know, go ahead and write it down, I know he doesn't have a driver's license and that's, thanks for going and helping him out.

Mr. Joseph testified that a driver's license was a requirement for working for him and that he had two company-owned vans that were used in hauling employees and materials to jobs. He testified that he asked job interviewees about their drivers' licenses and had declined to hire applicants who did not have a license. He testified that during Cooke's interview he specifically asked Cooke if he had a license and Cooke created the impression that he had one. As part of Zimmerman's initial hiring paperwork, Zimmerman submitted and the Employer retained a copy of his drivers' license.

Mr. Joseph recalled that it was mid-February 2004 when Cooke first told him that he did not have a current drivers' license. He recalled that from that time on he had repeatedly informed Cooke that he needed to obtain his driver's license over a period of time only to receive numerous promises and assurances from Cooke about his efforts and difficulties but without any result. Joseph testified further on another occasion he told Cooke: "I said he's no longer going to be working for the company if he doesn't get his license." He was met with statements that Cooke was working on it, but Cooke's specific promises and assurances simply did not come to fruition. On one occasion, Joseph testified that Cooke even told him the license was in the mail.

Mr. Joseph testified that he spoke to Cooke about it again on Thursday, May 13, 2004:

> This time I told him I was kind of tired of his excuses and he needs to get his license by Monday or he will no longer work for Perfect Climate. And I said that if he needed to

[4] Cooke testified that the conversation occurred on a day in which the Union's agents had visited a job sight and spoken to Joseph. Other evidence establishes the date of that event was May 12.

take Friday off, you can take Friday off, that's fine. I can adjust the workload, but you need to have it by Monday morning or you're not going to be working here. . . . He said, "Yeah, no problem. I'll get the license."

Mr. Cooke did not take the next day off and following the weekend returned to work on Monday, May 18, 2004. Joseph asked him if he had his license and Cooke said he did not. Joseph fired him.

Mr. Joseph recalled that Zimmerman who was present when he fired Cooke, then said that Scott Simmons did not have a driver's license. Joseph did not have any knowledge about Scott Simmons's possession of a drivers' license. He asked Scott Simmons, who was also present, if he had a license and Scott Simmons said he did not. Joseph testified he told Scott Simmons: "I said, "Well, you have another day to get your license or you will no longer be working here." Scott Simmons obtained and showed a valid temporary drivers' license to Joseph within the required period.

Mr. Scott Simmons testified to the ultimatum given him by Joseph after Cooke's discharge:

Q Why'd you [get your driver's license]?
A Because Paul [Joseph] said get one or he was going to have to let me go. …
Q Did he give you any other instructions about the license?
A Yeah. He said, if you have to take the day off, take the day off, but I need the license by Tuesday morning.
Q Did he mention James Cooke[e]?
A Yes, he did. He said I'm giving you the same amount of time I'm giving James.

David Zimmerman did not recall his asking Joseph about Simmons's drivers' license at that time nor did he hear Joseph give Simmons's a deadline respecting his license.

Although the record is not crystal clear, Mr. Scott Simmons's difficulties obtaining a driver's license arose out of his inability to obtain liability insurance which – at least in the belief of the witnesses - in turn could be obtained only by owning, registering, and insuring a motor vehicle. With the assistance of Mr. Joseph, a long-time friend, Scott Simmons obtained, registered and insured a truck and thereby became able to obtain a drivers' license.

b. Employee David Zimmerman

Mr. David Zimmerman is an experienced sheet metal worker and a long-time member of the Union. He began work on February 16, 2004 for the Employer having been recruited by the Union to apply. During the course of his employment Mr. Zimmerman initially worked as a lead man taking instructions from Mr. Joseph. He testified that he had a normal personal relationship with Mr. Joseph until the Union campaign and employees' union activities became known to Joseph on May 11. Thus he testified that on May 12 in a phone conversation Joseph was short, blunt and not too terribly friendly. At the end of that working day, he was told by Scott Simmons to report to the shop at 5 am, an unusual instruction since Zimmerman normally coordinated with Joseph respecting scheduling.

On May 13, 2004, the following day, Zimmerman came to the shop and had a conversation with Joseph in the presence of employee Scott Simmons. Joseph told

Zimmerman, in Zimmerman's recollection that Scott Simmons "would be running the jobs from now on, that I was supposed to do what he said."

Scott Simmons denied ever being appointed lead in so many words. Thus he testified:

> Not that I ever recall [Joseph] ever saying I was the lead. He, Paul [Joseph], did ask me to -- he needed my help to get the job done. The job was going in the tank, it was failing inspections, and he asked me to step up a notch and let's get this thing done is what he asked me.

Zimmerman also testified that in the May 13 shop conversation, he had an argument with Joseph respecting his recorded work hours the previous day. Zimmerman told Joseph that he had "clocked out" at the end of his time at a jobsite the previous day at about 3:00 p.m. Joseph challenged the time asserting the he knew that Zimmerman had been in the shop after that. Zimmerman told Joseph that it was true he had stayed at the shop assisting Cooke with what he believed were heavy and dangerous procedures that should not be done by one worker alone. The two argued and Zimmerman reiterated the proposition that he was on his own time after his jobsite departure so that his time was as he had recorded it.

Following the argument, Zimmerman testified, Joseph went out to his truck and returned with a handwritten paper which he characterized as a written review of what they had just talked about and had both Zimmerman and Scott Simmons sign it. Zimmerman testified this was the first time he had ever been asked to sign a paper recording a conversation or any type of written record. In the two-week period thereafter culminating in Zimmerman's May 26 termination, he was asked to sign two more papers apparently memorializing criticism of his work: one in association with a job at Discount Tire Service and one associated with the Renton Retail job.

The record contains substantial and detailed testimony respecting various jobs undertaken by the Employer on which Zimmerman worked. Generally, the Employer's testimony by Joseph and Scott Simmons painted a picture of a series of work errors and omissions attributable to Zimmerman that caused failed building inspections and wasted time and material and, more importantly, diminished the reputation of the Employer in the eyes of the general contractors' representatives on the jobsites. Joseph further testified to receiving only general denials and intransigence by Zimmerman who would admit no failings when confronted with his mistakes.

The government and Charging Party's evidence regarding these events was essentially the reverse. Thus, the errors and omissions advanced by the Employer's evidence were minimized and trivialized in some instances or blamed on others in other instances. Zimmerman testified that as to some matters, Joseph and he had discussed the circumstances before the Union demand of May 11 and at that time Joseph had not regarded the matters as of consequence and became hostile only when he learned of employees and Zimmerman's support for the Union.

On May 26, 2004, Zimmerman reported to work at the shop and was terminated by Joseph. Zimmerman testified that he was simply told by Joseph that he was fired, to pick up his tools and was further told he would get his check in the mail. Zimmerman asked for a reason for his termination and Joseph simply told him he was fired. Zimmerman asked for copies of the various documents he had been asked to sign and Joseph refused. Zimmerman then left and has not been offered reinstatement.

Mr. Joseph testified that he had gone out of his way to avoid terminating Zimmerman because of the union campaign. He did not want it to look as if Zimmerman was terminated for union activities. Joseph testified that the "last straw" in his relationship with Zimmerman was the telephoned complaint of the superintendent of Baker Construction the general contractor on the PETCO job that Zimmerman was working on. The superintendent called Joseph and complained that Zimmerman was on the job but was not doing any work because an area of the site was occupied by other crafts. Joseph knew that was a great deal of work to be done in other areas and told the superintendent that Zimmerman just should work where he could when prevented from working in certain areas.

Joseph regarded Zimmerman's reported conduct on the job as highly improper. The employee needed to get the work on the jobsite done. The general contractor had earlier let Joseph know he wanted the Employer's work on site completed. Joseph did not want his employees to aggravate the general contractor whose company was a major source of employment. The telephone call and the several failed inspections on jobs worked by Zimmerman convinced Joseph he had to let Zimmerman go. He therefore discharged Zimmerman

Zimmerman testified that after he was discharged he visited the superintendent on the PETCO job and was told by him

> Q Do you have an appreciation for whether or not the general called Mr. Joseph to complain about you?
> A Well, actually being as how I went back a day or so later and asked him, no.
> Q You don't think --
> A -- he told me, I went back a couple days later to see if he, he'd said something that caused me to get fired and I asked him. And he said no, I was quite pleased with your work.

The superintendent did not testify.

C. Analysis and Conclusions Respecting Allegations of the Complaint

1. Initial Remarks Respecting the Bias, Alliances and Motivations of the Witnesses

The instant case presents an unusual conflict of institutional interests and the individuals associated with them. While in a typical organizational campaign the Union is seeking to represent the employees of an employer and the employer may hold the view that it would be better off without its employees represented by a labor organization, here the conflict is more fundamental.

I notice administratively that the construction industry in the United States in recent decades has become largely populated with "union scale" contractors – often organized -- and with non-union scale contractors – generally unorganized. The lower labor cost contractors are perceived a threat to both the union scale contractors and to the building trades unions representing their members working for those contractors. The lower cost contractors generally work in markets where they feel they could never support union scale remuneration and thus view the organization of their employee compliment by a building trade union as a possible entrepreneurial death threat. In such a setting, there is the perceived view on each side of a representation campaign that compromise is difficult if not impossible. The instant record suggests such a perspective was held by the Employer and at least some of the salts employed.

Not only are the institutional interests involved herein potentially more antagonistic than is typically the case, the employees involved were closely associated with either the Union or the Employer. Thus Messrs. Zimmerman and Smith were recruited by the Union to be salts[5] and the two and later Mr. Cooke received financial subsidies from the Union bringing their total remuneration up to union scale. And the Simmons' family members involved had known Mr. Joseph for some time as family friends and, the record suggests, were hostile or at least not sympathetic to the salts and the Union. No neutrals testified in this proceeding.

Counsel for the Respondent argues that Mr. Joseph was not hostile to union-supporting employees and suggested the fact that he knew Cooke was a union member when he was hired supports that proposition. I disagree. Cooke told Joseph he would be fined by the Union if he was caught working for a non-union contractor. In effect Cooke was announcing he was joining with the Employer against the wishes of the Union and was at risk of union discipline. Mr. Joseph would not reasonably have concluded from such remarks that Mr. Cooke was an advocate of the Union, therefore his hire does not support the proposition asserted by counsel for the Respondent. And the record suggests by Mr. Joseph's conduct when the Union agents came on to his jobsites, that he was neutral or indifferent to the Union's organizational campaign. Rather I specifically find, based on the record as a whole that he was strongly opposed.

Another aspect relevant to evaluation of the evidence is that the bulk of the actions in dispute took place at times when all the participants were aware of the loyalties and affiliations of the others involved, were at least generally informed of their own legal rights and were at least generally aware that the others were also so aware. Save for the period prior to Mr. Joseph's meeting with legal counsel, the actions of all the parties were made in the knowledge that everything was susceptible to challenge and subsequent litigation and the further knowledge the government was preparing to conduct a representation election.

2. Complaint Paragraph 5 – Alleged Interrogations by Joseph

As described in the presentation of evidence in Section III, B above, employees Zimmerman and Smith each testified to being asked about the Union by Joseph immediately after the Union demand. Mr. Joseph denied doing so. I credit Zimmerman and Smith, discredit the denials of Joseph, and find the statements were made as described by the two employees.

I do so in part on credibility grounds. Smith and Zimmerman's demeanor during their testimony respecting these matters was sure and convincing and did not suggest a scripted or memorized recitation. I was convinced they testified from their memory of these events. I do not necessarily believe that Mr. Joseph was lying or dissembling in his denials. As he testified, the period just after he learned of the Union petition was one of tension and confusion. As will be further discussed below, I find and conclude that in the short period between the time he learned of the Union campaign and the time he took legal counsel, he made statements which, inconsistent with his subsequent instructions from counsel, were best put from memory.

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[5] *Tualatin Electric, Inc., v. NLRB*, 84 F.3d 1202 (9th Cir. 1996), n. 1 at 1202:

> Salting a job" is obtaining employment with a non-union employer and then organizing its employees for the union. The term may be derived from the phrase "salting a mine," which is the artificial introduction of metal or ore into a mine by subterfuge to create the false impression that the material was naturally occurring.

See also *Tualatin Electric, Inc*., 312 NLRB 129 (1993), ALJD n. 3 at 130.

In reaching the conclusion set forth above, I have also considered the paid allegiances of the three union supporting employees, the fact that they were involved in surreptitious conduct, that Zimmerman's answer to Joseph in the conversation under consideration, i.e. that he had no knowledge of the union activities, by his own admission was a lie and finally that there was conflicting evidence respecting the location and circumstances of Smith's version of this conversation with Joseph. Each of these aspects was skillfully advanced by counsel for the Respondent. On balance however, given the credibility resolution made and the other conduct which I found to have occurred as set forth below, I found the Respondent's arguments unpersuasive even considering the burden the General Counsel bears in proving these allegations.

Having credited Zimmerman and Smith: Does the conduct found to have occurred violate Section 8(a)(1) of the Act? The General Counsel cites the traditional cases supporting the classic proposition that an employer may not interrogate its employees to learn who supports the union or the union representation drive. Counsel for the Respondent argues that these employees were paid union agents and that it is permissible for employers to have discussions with open and notorious union supporters that might be prohibited if conducted with other employees.

At the time the conversations occurred, Zimmerman and Smith were not known or open union supporters. Mr. Joseph's conduct is therefore not sheltered by the Respondent counsel's argument that they were open and committed union supporters. Indeed an employer's interrogation of employees to determine their attitude, opinions or support for a union organizational campaign is a classic violation of the Act. *Pleasant Manor Living Center,* 324 NLRB 368 (1997). Complaint paragraph 5 is sustained**.**

3. Complaint paragraph 6 – Alleged Promulgation of New Rules

a. The No Smoking Rules – Complaint Subparagraph 6(a)(i)

(1) The Shop

As set forth in the evidence section above, Mr. Joseph is alleged to have announced a new shop smoking restriction as well as a no smoking rule in company vans soon after the Union demand. Mr. Joseph denied making such an announcement. Further he testified that he had always prohibited smoking within the shop proper and required smokers to go to the doorway if they were smoking. He testified that he had never at any time prohibited smoking in the vans.

Cooke testified that he regularly smoked in the shop and that Joseph had earlier presented him with an electrical outlet box for use in the shop as an ashtray. Further he recalled that the statement of Joseph limiting in the shop smoking occurred in the context of Joseph complaining that he had noticed a cigarette butt on the ground in the shop area. Cooke testified that after the limitation was announced he stopped smoking in the shop and noticed that Scott Simmons, the other smoker, also discontinued his smoking in the shop.

I credit Cooke, a smoker who would have been more likely to pay attention to any statements by Joseph respecting smoking than his non-smoking colleagues, along with the substantial corroborating testimony set forth earlier. This credibility resolution importantly includes Cooke's testimony that Mark Simmons stopped smoking in the shop after the announcement. I discredit Joseph and Mr. Scott Simmons. I find that smoking was in fact

allowed in the shop and that Messrs. Cooke and Scott Simmons at least smoked there until they were limited to the doorway and the outside.

While limiting smoking is doubtless objectively a good thing both for the smokers and for others who would be exposed to secondhand smoke if the smoking were not limited, smoking is also a benefit that may not be properly prohibited as a punishment for union activities. The timing of the announcement/prohibition on this record meets the burden the General Counsel bears of establishing that union activities were a substantial or motivating reason for the prohibition under the Board's touchstone case, *Wright Line*, 251 NLRB 1083 (1980 for evaluating discrimination allegations. Since that Employer here has not met its burden of showing that the prohibition would have been implemented in the absence of the employees union activities, I find the General Counsel has prevailed respecting this allegation. The conduct violated Section 8(a)(1) of the Act. The portion of complaint subparagraph 6(a) dealing with the shop is sustained.

(2) The Vans

The government alleges that Joseph's prohibition included smoking in the vans. Joseph and Scott Simmons testified this simply was not so. The evidence respecting the announcement was discussed above. Additionally, Zimmerman and Scott Simmons testified to a conversation which took place when the two were to take a trip of some duration together in the van. The versions differ but there is no doubt that Zimmerman and Scott Simmons spoke of a smoking prohibition applicable to the vans.

In the immediately proceeding analysis I have determined the prohibition announcement took place. I carry that credibility resolution, analysis and conclusion forward and apply it to the current allegation buttressed by the undisputed fact that Zimmerman and Simmons spoke of the prohibition. I find there was an announced prohibition and that its announcement in the identical circumstances described respecting the shop prohibition, violated Section 8(a)(1) of the Act. The portion of complaint subparagraph 6(a) dealing with the vans is sustained.

b. Complaint Subparagraph 6(a)(ii) - The Dress Code Allegation

The evidence set forth in part above establishes that the Respondent did not have a mandatory policy requiring employees to wear company shirts before the events in controversy even though it did in fact have and had provided company items of clothing to employees. Nor is there persuasive evidence that Joseph personally suggested to employees that the wearing of company shirts was mandatory. It is clear, however, that he gave company shirts to Scott Simmons and instructed him to pass them along to employees. Scott Simmons testified as follows:

> Q At some point, Mr. Joseph provided you the company shirts, correct?
> A Yes.
> Q And, just to pinpoint the time period that this occurred, this was after Mr. Zimmerman was fired, but before the election, correct?
> A Correct.
> Q And, when Mr. Joseph provided you with company T-shirts, he told you that he wanted you to wear the shirts, correct?
> A He wanted us to wear the shirts, yeah. It wasn't a demand. It was, here, I'll give you some shirts to wear.

Q I'm sorry. I don't believe you answered the question. The question is, when Mr. Joseph provided you with company T-shirts, he told you that he wanted you to wear the shirts.
A He wanted us to wear it, yes.
Q And, specifically, Mr. Joseph told you that he wanted you to wear the shirts when you were working for him, right?
A Yes.
Q When Mr. Joseph provided you the company shirts, he gave you the shirts to provide to other employees, right?
A Yes.

The issue in my view is whether or not Scott Simmons in the period immediately before the election in distributing shirts to employees, implemented a new policy by telling employees that Joseph wanted them to wear the shirts at work. There is no real dispute that Scott Simmons told employees to wear the shirts and that they did so, in Smith's case removing or covering his union shirt to do so. Indeed Scott Simmons's specifically testified he told the employees: **"**Mr. Joseph wanted them to wear them to work".

The General Counsel did not allege Scott Simmons was a supervisor nor that he was the agent whose conduct violated the Act in subparagraph 6(b) of the complaint. Joseph however gave instruction to Scott Simmons who thereafter acted in Joseph's name in instructing the employee's regarding the shirts. I find that Joseph is therefore responsible for the reasonably foreseeable actions of Scott Simmons in carrying out his instructions regarding the shirts. In effect, the allegation is to be analyzed as if Joseph had distributed the shirts to the other employees and made the statements that Mark Simmons made to them.

Viewing the facts in that light, I find that the Respondent through Joseph and Scott Simmons did in fact instruct the employees to wear the company shirts. The record indicates the employees did in fact put them on immediately after being given the shirts. There was a dispute in the testimony regarding whether or not the shirts were worn by the employees while at work without exception thereafter. That question however does not turn the violation. Here the statement made to the employees along with the distribution of the shirts was clearly undertaken in association with and, I find, in response to the fact that some of the employees had begun wearing union shirts. As announced by Simmons, the employees reasonably took the instruction to wear the shirts to be mandatory. Thus, even if not directly intended by Joseph, the employees received mandatory instructions to wear the Employer shirts and Joseph was responsible for the instructions being given to the employees. As such, the instructions were a violation of Section 8(a)(1) the Act and I so find. Complaint subparagraph 6(a)(ii) is sustained.

4. Complaint Sub-Paragraph 7(a) - the Discharge of Cooke Allegation

There is no dispute that Mr. Cooke was a good worker or that he was terminated on Monday, May 17, 2004, because he had failed to obtain a drivers' license within the time period set by Mr. Joseph on Thursday, May 13, 2004. The issue in this aspect of the case is whether or not the ultimatum of May 13, 2004 was proper or improper.

The General Counsel argues the ultimatum was simply part of Joseph's malign campaign against the Union and the employees who supported it. The Respondent argues that a driver's license was necessary for employees, that Cooke had consistently said he was getting one, but was simply lying. Finally, the Respondent gave Cooke a clear deadline which he did not meet.

The parties both note the fact that Joseph also gave Scott Simmons a drivers' license ultimatum. The Respondent notes this indicates the evenhandedness of Joseph. The General Counsel argues that the fact that Scott Simmons did not have a license shows it was not in fact necessary and further argues that the ultimatum to Simmons was simply made in an attempt to show evenhandedness concealing its true wrongful motivation for giving Cooke the ultimatum and hiring him. Finally, the General Counsel notes that in the event, Joseph assisted Simmons in the licensing process and did not even offer to do so for Cooke.

The Board in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), established a test for approaching discrimination allegations which was restated in *Manno Electric*, 321 NLRB 278, 280, n.12 (1996):

> Under [*the Wright Line*] test, the Board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Office of Workers Compensation Programs v. Greenwich Collieries*, [114 S.Ct. 2551, 2557-2558 (1994)], at 2258.

There is little doubt and I find that the counsel for the General Counsel has met her initial burden to show that Cooke was given the ultimatum and thereafter discharged because of his and other employees' support for the Union and because of the Union's demand for recognition. Thus the timing, the other unfair labor practices found herein that occurred hard upon the Respondent learning of the Union's campaign and the fact that Joseph had long known that Cooke did not have a license but had never given him a time limit on obtaining one until the Union arrived on the scene, all support this finding.

Given that threshold finding: Does the record sustain the Respondent's burden of persuasion that it would have given Cooke the ultimatum it did and terminated him when he did not meet its requirements, even if Cooke and the other employees had not engaged in Union activity and the Union had not filed a petition for an election? For the reasons set forth below, I find and conclude that it does not and I sustain the General Counsel's complaint allegation in complaint paragraph 7(a).

Two elements are critical in my view, the first is the complete absence of any evidence that Joseph set a timetable for Cooke to obtain a license before he became aware of the employees' union activities, let alone gave Cooke an ultimatum that a failure to obtain a license would cause his termination until after the Union demand. The second is that numerous unfair labor practices were committed by Joseph in the short period following the Union's demand demonstrating both his animus and a willingness, even if ignorantly, to violate the Act. The Respondent offers no effective evidence to rebut the force of those two aspects of the case. The Simmons ultimatum, given after Cooke's discharge, does not sustain the Respondent's argument. The General Counsel's two rejoinders concerning it: (1) that it was undertaken only to justify the earlier Cooke ultimatum and (2) that Joseph helped Simmons but not Cooke in elements of the licensing process, are effective. Whether or not Joseph did not know earlier of Simmons' lack of a license as Joseph contented, or whether he knew earlier as Zimmerman contended, it is clear that Joseph had not demanded a license of Simmons up to that point.

All of the above suggests that Joseph did not consistently demand that new hires have drivers' licenses or that he uniformly required employees to have licenses. Since Cooke, admittedly a good worker, had gone for a long period without a driver's license and without ever

being given a deadline to obtain one, I find his post-Union demand deadline of but a few days length and discharge thereafter would not have occurred save for the union activities of employees. The General Counsel's complaint subparagraph 7(a) is sustained.

5. Complaint Sub-Paragraph 7(b), the Demotion, Warning and Discharge of Zimmerman Allegations

a. The May 13, 2004, Demotion of Zimmerman

As set forth above, Zimmerman worked for the Respondent as a lead from his hire in February 2004. He testified that immediately after the Union's demand and/or his identification as a union supporter, Joseph told him in a meeting with Scott Simmons that Scott Simmons "would be running the jobs from now on, that I was supposed to do what he said." I credit the testimony. It was persuasively delivered and seemed to come from recollection rather than a scripted response. As noted, supra, I have credited Zimmerman's memory of statement made previously. Further, this is but one of several actions against employees taken in the short time following the Union's demand.

That being so, I find the that the government has met its initial burden under *Wright Line* and that the Respondent has not demonstrated that the action would have been taken even had no union activities occurred. I therefore find that the Respondent violated Section 8(a)(3) and (1) when it demoted Zimmerman. Complaint subparagraph 7(b)(i) is sustained.

b. The May 13, 17 and 20, 2004 - Oral warnings of Zimmerman

The government argues that various criticisms given Zimmerman, which for the first time involved asking him and others to sign a note recording the conversations between Joseph and Zimmerman, were given because of Zimmerman's and the other employees' union activities. The Respondent argues, on brief at 8:

> Although the General Counsel alleged Mr. Zimmerman was issued "oral warnings" by Paul Joseph, there was no evidence of any such warnings. Mr. Joseph did, however discuss the numerous mistakes and errors that were occurring on Zimmerman's jobs.

I agree with the Respondent on this record there is insufficient evidence to call the events at issue "oral warnings" in any formal or progressive disciplinary sense. Rather there were conversations respecting Joseph's complaints about Zimmerman's work. Joseph criticized Zimmerman but did not advise him of the possibility of future adverse action. Such cautions are the essence of warnings. To the extent the General Counsel is advancing a pretextual disciplinary pattern and practice, the evidence is relevant to the allegation of Zimmerman's discharge, but it does not support allegations of a wrongful free standing campaign of protected activities based on "oral warnings."

On brief the General Counsel also seems to argue that the allegation addresses not only the oral warnings but rather the written record of those alleged warnings and/ or the requirement that Zimmerman sign such notes or documents. Thus the General Counsel argues on brief at 23: "The overwhelming evidence shows that before the Union's demand for recognition, Respondent did not demand Zimmerman sign any warnings or reprimands." While relevant to the discharge allegation, the record evidence does not address the "oral warnings" allegation of complaint subparagraph 7(b) and no specific complaint allegation alleges a new system of written documentation was improperly implemented.

Given all the above, I find the counsel for the General Counsel has not sustained her burden with respect to complaint subparagraph 7(b)(ii) and it shall be dismissed.

c. The May 26, 2004, Termination of Zimmerman

The evidence is set forth in greater detail, supra. On May 26, 2004, Zimmerman was discharged without explanation. Mr. Joseph testified it was because of various work issues and problems with Joseph's conduct. Joseph testified that in the short period preceding Zimmerman's termination the jobs associated with Zimmerman were failing inspections, were experiencing problems and that general contractors were not happy with his company. Joseph testified he received a telephone complaint from a major clients superintendent on a job for which the Respondent was a subcontractor. Joseph asserted that although he was trying to avoid firing Zimmerman because of his union activities, he felt he was compelled to do so to protect his reputation, client relations, and future business.

Given the unfair labor practices found above as well as the timing of the Respondent's actions respecting Zimmerman and the others, I find that the counsel for the General Counsel has met her initial *Wright Line* burden to show that antiunion sentiment was a substantial or motivating factor in the Respondent's termination of David Zimmerman and that the burden of persuasion has shifted to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

That does not resolve the dispute respecting subparagraph 7(b)(iii) however. The Respondent, through the testimony of Joseph, testified that he believed Zimmerman was putting his business at risk through his work mistakes and work problems which were causing failed inspections and general contractor disapproval. If credited, this testimony would essentially compel a finding that Zimmerman was terminated for conduct that would have caused his termination even had the employees engaged in no union activities and the Union had not made a demand upon the Respondent.

Substantial testimony was received from Joseph and Scott Simmons, as described in part above, that the jobs Zimmerman was associated with had failed inspections, materials were wasted and improper actions were taken and necessary actions omitted. Mr. Zimmerman and as to certain matters, Cooke and Smith testified that the errors and other complaints made by Joseph about Zimmerman's work in fact had been the fault of Joseph, were the fault of others or were of minor consequence.

What the dispute breaks down to is a credibility resolution respecting the conflicting testimony of the work problems and the important testimony of Joseph that he did in fact believe that Zimmerman was at fault in the various work issues and problems and that the potential consequence of these faults and their continuance was the jeopardizing of his business as the result of Zimmerman alienating the contractors who provided him with repeat subcontracting work.

In resolving the dispute, I have carefully considered the record as a whole, the findings respecting the other allegations of the complaint and the demeanor of the witnesses to the relevant testimony. Not all testimony which is seemingly opposed is in fact inconsistent. Thus, while there may be some objective reality in most cases, witness testimony respecting issues of fault and work quality are usually subjective to different degrees. It is possible for two individuals or alliances of individuals to subjectively view their own efforts favorably and the efforts of others as of lesser quality. That was at least to a degree the case herein. And, as with Joseph's and Zimmerman's testimony regarding their conversations with the general contractor,

it is possible for each witness to be truthfully and accurately testifying to his own experience. Thus a general contractor may well complain about a subcontractor's employee to the owner of the subcontractor and thereafter simply deny having so complained to the subcontractor about the employee when confronted by that employees after the event.

Important to my resolution of the disputed testimony is the fact that there was no effective challenge to the Respondent's offered testimony that the Respondent had not suffered from failed inspections or contractor complaints in any significant way until May and that it did suffer those problems thereafter at least until Zimmerman's termination. This is important because elsewhere in this decision I have found the precipitous nature of the Respondent's actions against employees followed hard upon the Union's demand and the subsequent identification of the employee union organizing committee. The evidence that significant problems manifested in the same period supports the Respondent's argument that the timing of Zimmerman's termination was not related to the union activities of employees.

I credit Paul Joseph in his critical testimony that he believed his business was at risk from the string of problems that culminated in the contractor complaint described above. I further credit his testimony that he believed that David Zimmerman was responsible for the situations and that he fired Zimmerman as a result. I do so knowing that I have found earlier that once Joseph learned of the employees' union activities, he showed strong antiunion animus and committed various unfair labor practices including the termination of Cooke. I do so knowing that I have found his memory lacking and have credited others where their testimony differed respecting the various issued discussed supra. I have done so even given that the Respondent at this stage of the analysis bears the burden of proof respecting whether or not Zimmerman would have been terminated even if the employees had not engaged in union activities.

Despite all the listed negatives, Joseph's testimony convinced me he was telling the truth. His demeanor was persuasive during the relevant testimony. I was particularly convinced of the sincerity of his view that as a small subcontractor working on a repeat basis for a few important general contractors, he could not risk alienating those contractors' general superintendents. That fact coupled with the second fact, which I also find, that work problems at least in the form of failed inspections and contractor complaints had manifested in the short period preceding Zimmerman's terminations, lends important support to Joseph's testimony that he determined to act when he did.

In conclusion, I viewed the testimony of Joseph with skepticism given the earlier findings, but was impressed and persuaded by this portion of his testimony and, considering that testimony in light of the fact that the issue in any termination case in which misconduct is the defense is the subjective opinion of the decision taker, concluded that Joseph believed Zimmerman was the cause of the work problems discussed and that the elimination of those problems was of critical importance. In light of that fact and despite all of the above to the contrary not with standing, I concluded that Joseph would have fired Zimmerman when he did even if the employees had not engaged in union activities and the Union had not taken the actions it did.

I find therefore that the Respondent has sustained its *Wright Line* defense that Zimmerman would have been fired as he was even if no union activities had ever taken place. The Respondent has established its affirmative defense to contract subparagraph 7(b)(iii) and it shall be dismissed.

IV The Challenged Ballots

Seven individuals cast ballots in the election. Six were challenged by the parties, one by the Bard agent. The Employer challenged the ballots of Messrs. David Zimmerman and James Cooke. The Petitioner challenged the ballots of Messrs: Dale Simmons, Mark Langdon, Mark Simmons and Scott Simmons. The single remaining voter, Mr. Marquis Smith, cast a ballot challenged by the Board agent to protect the secrecy of Smith's ballot

Voter eligibility was established for unit employees who were employed during the payroll period of May 2 through 16, 2004,[6] and the election date of June 12, 2004. Also eligible to vote were employees in the unit who had been employed for 30 days or more within the year preceding the eligibility date for the election or those who have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility and who had not been terminated for cause or quit voluntarily prior to the competition of the last job for which they were employed.

A. Messrs. Scott and Mark Simmons – The Parties Stipulated Agreement

The parties stipulated that Mr. Scott Simmons was an eligible voter at relevant times and that the challenge to his ballot should be overruled. The parties further stipulated that Mr. Mark Simmons was not an eligible voter at relevant times and that the challenge to his ballot should be sustained. I accept the parties' stipulations. I shall therefore recommend below that the challenge to Mr. Scott Simmons's ballot be overruled and his ballot opened and counted. Further I shall recommend the challenge to Mr. Mark Simmons ballot be sustained and his ballot not be opened and counted.

B. Messrs. David Zimmerman and James Cooke – Alleged Discriminatees

I have found above that the Respondent improperly terminated Mr. Cooke in violation of the Act. The only remaining argument concerning his eligibility is the Respondent's claim that Cooke as a "salt" whose wages were subsidized by the Union was ineligible for those reasons. The Charging Party cites the current law holding precisely to the contrary: *NLRB v. Town & Country Electric,* 516 US 85 (1995) reversing 34 F3d 625 (8th Cir. 1994), remanded 309 NLRB 1250 (1992).

It follows that Cooke is an eligible voter and I shall recommend that his ballot be counted.

I have found that Zimmerman was terminated for cause. It follows that he was not an eligible voter at the time of the election. I shall therefore recommend that his vote not be counted.

C. Messrs: Dale Simmons and Mark Langdon

1. Evidence Respecting Dale Simmons

The Respondent's pay records indicate Mr. Simmons was in paid employment in the period June through September 2003, and briefly in February 2004 and May 2004. The paid

[6] The payroll period for eligibility was stipulated at the hearing.

hours total over 270. He did not work thereafter to the date of the election. To be eligible to vote, he must have worked 30 days in the year preceding the election.

2. Evidence Respecting Mark Langdon

Mr. Joseph testified respecting the end of Langdon's employment:

> Q Now Mark Langdon worked for you up through January sometime in 2004, correct?
> A Correct.
> Q And did he quit his employment or was he discharged?
> A He quit.
> Q And did he quit to take another job?
> A Yes. After the completion of the job we were doing. He said he wanted to leave the company.
> Q And that was his choice, not your choice?
> A Correct.
> Q You had other work for him to do?
> A I didn't have a project starting right away. I had the Chipolte job was going to be starting.
> Q When did the Chipolte job start?
> A Probably -- it was when I hired James [Cooke]. It was like two 1 weeks, I think, after Mark left. Approximately. I think I hired James in the middle of January or something. Around in January.
> Q Well, Mr. Cooke indicated it was in mid-January.
> A Okay. Then it's mid-January.
> Q And Mr. Langdon's last payday was January 18th, 2004, wasn't it?
> A Correct.
> Q So how did -- Did Mr. Langdon miss a day or so?
> A Well, when I hired James, yes. I mean I didn't have a project starting. I had the contract, but the project wasn't going on at the time.
> Q Did you fill out a form for unemployment indicating the circumstances of Mr. Langdon's leaving his employment with Perfect Climate?
> A Yes.

The Respondent's payroll records indicate that Mr. Langdon's last payroll period of employment was January 16-31, 2004 during which he worked 63.5 hours.

3. Analysis and Conclusions Respecting Dale Simmons

The Respondent argues on brief at 17:

> The Union did not establish any reason to challenge the ballot of Dale Simmons. Dale Simmons worked a sufficient number of hours and was employed during the eligibility period.

The counsel for the Charging Party looks askance at the Respondent's payroll records respecting Mr. Simmons. Thus he notes the payroll records do not meet Washington State law and regulation minimum requirements, and further asserts they are irregular, inconsistent and generally suspicious. The Charging Party concludes on brief at 8:

> In short, given the incredible nature of the documents proffered by Perfect Climate to show the employment history of Dale Simmons, and its failure to produce records it was required to keep such as the time cards it kept in its regular course of business that would show the days and hours and jobs that Dale Simmons worked, it is appropriate to conclude that he did not work 30 days within the last twelve-month period.

The Respondent's records are largely as the Charging Party contends. However Mr. Joseph testified at some length as to his failings and informalities in accounting and paperwork maintenance. Mr. Dale Simmons did not testify.

I am unable to conclude that these records must be set aside in the absence of more substantial evidence of invalidity, falsification or withholding. The fact that state law may require more than the Respondent generated and the fact that the Respondent did not keep all that it produced, standing alone or in conjunction with the Charging Party's described sorry state of Respondent's records is an insufficient basis to simply them set aside and find Simmons simply did not work sufficient time to establish his ballot eligibility.

I find therefore that the requisite quantum of work for Mr. Dale Simmons has been demonstrated and he is an eligible voter. I shall recommend that his ballot be opened and counted.

4. Analysis and Conclusions Respecting Mark Langdon

Mr. Mark Langdon was not employed by the Employer after January 2004, however his hours of work met the eligibility formula set forth above for time worked.

The Respondent argues on brief at 17:

> Mark Langdon worked a sufficient number of hours and as employed during the eligibility period. Mr. Joseph testified that Mark Langdon quit at the conclusion of his last job assignment and, rather than wait through a brief hiatus until Perfect Climate's next job started, found other employment. Mark Langdon is also an eligible voter.

The Charging Party contends that Mark Langdon was not eligible to vote because he failed to meet the non-hours worked requirement of the eligibility formula. Counsel for the Charging Party argues: "Langdon quit to take a job with another employer. He did not quit because a project was over." (Petitioners Brief at 6.)

Mr. Langdon did not testify. Mr. Paul Joseph's testimony quoted above suggests that Langdon quit: **"**[a]fter the completion of the job we were doing". Counsel for the Charging Party challenges the proposition that a project was over asserting that Langdon was not hired for particular projects and that he should therefore not be eligible to vote.

I find the noted evidence sufficient to establish Langdon's ballot eligibility. There was no suggestion that the Respondent's employees worked other than on construction projects and in preparing items for such work. While employees were not hired for specific projects, they were not employed if there were no projects. Such employment is within the eligibility formula. Thus, if a project was ending and an employee quit to work for another contractor or for other reasons, he or she is not disenfranchised for that reason.

To the extent, the Charging Party seeks a supportable inference, contrary to Joseph's testimony, that Langdon quit mid project, I reject that argument. The other record evidence, i.e.

that of Cooke on his circumstances in starting employment with the Respondent and the documents establishing Langdon's last days and hours of employment, is not inconsistent with Joseph's uncontradicted testimony. I credit Joseph. Langdon was therefore eligible to vote. I shall therefore recommend that the Board overrule the objection to Langdon's ballot and that it be opened and counted.

D. Mr. Marquis Smith

The challenge to Mr. Marquis Smith was undertaken by the Board agent solely to preserve the secrecy of his ballot, which would otherwise have been the sole unchallenged ballot cast. There is therefore no issue respecting his ballot.[7] I shall recommend it be opened and counted.

RECOMMENDATIONS

Based on the above, I make the following recommendations respecting the challenged ballots.

I have found the following individuals were eligible to vote and recommend that the challenges to their ballots be overruled and that their ballots be opened and counted at a time and place as the Board or the Regional Director shall direct:

Scott Simmons
James Cooke
Dale Simmons
Mark Langdon
Marquis Smith

I have found the following individuals were not eligible to vote and recommend that the challenges to their ballots be sustained and that their ballots not be opened and counted.

Mark Simmons
David Zimmerman

REMEDY

Having found that the Respondent violated the Act as set forth above, I shall order that it cease and desist there from and post remedial Board notices.

To remedy the illegal termination of Mr. Cooke, I shall direct that he be offered immediate reinstatement to his former position discharging, if necessary, an employee hired to replace him. Further the Respondent shall make him whole for any and all loss of earnings and benefits he may have suffered as a result of his wrongful termination, with interest. The make whole and interest provisions shall be calculated in accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950) *and Florida Steel Corp*., 231 NLRB 651 (1977); with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); see also *Isis Plumbing Co.*, 138

[7] The Respondent's argument that Smith is an ineligible voter as a result of his relationship with the Union is out of time. Were it the basis of a timely challenge of his ballot, the argument would fail on its merits. See the Respondent's identical argument respecting Cooke's ballot, supra.

NLRB 716 (1962). The Respondent shall expunge from its personnel records any record of his improper discharge of Cooke and will notify him, in writing, that this has been done and that his improper discharge will not be a basis for discipline against him in future. Given the circumstances of his termination, the Respondent shall be precluded from requiring Mr. Cooke to possess a valid drivers' license until he has been hired and thereafter allowed a reasonable period of time to acquire it.

The Respondent will also be required to return to its earlier policies respecting smoking in the shop and company vans. In light of Mr. David Zimmerman's subsequent termination, no remedy for the wrongful removal of his lead status will be directed.

Conclusions of Law

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. The Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) Interrogating employees concerning employees union activities.

(b) Creating and maintaining a mandatory employee dress code.

(c) Prohibiting smoking in the shop and company vans.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by:

(a) Demoting David Zimmerman because of his union activities and the union activities of other employees.

(b) Discharging James Cooke because of his union activities and the union activities of other employees.

5. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not otherwise violate the Act as alleged in the complaint and the complaint allegations not sustained shall be dismissed.

ORDER

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.[8]

The Respondent, Perfect Climate, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning employees union activities

(b) Creating and maintaining a mandatory employee dress code because of employees union activities

(c) Prohibiting smoking in the shop and company vans because of employees union activities

(d) Demoting or discharging employees because of employees union activities

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Rescind and withdraw its May 2004 no smoking and mandatory employee dress code rules.

(b) Offer employee James Cooke immediate reinstatement to his former position, discharging, if necessary, any employee hired to replace him and make him whole, with interest, for his losses of pay and benefits resulting from his improper discharge as is set forth in the section of this decision entitled Remedy.

(c) Remove any and all references in its personnel records of Mr. Cooke's wrongful discharge and notify him in writing that this has been done and that the discharge will not be the basis of discipline against him in future.

(d) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to determine if the terms of this Order have been complied with.

[8] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

(e) Within 14 days after service by the Region, post copies of the attached Notice at its Redmond, Washington facility set forth in the Appendix[9]. Copies of the notice, on forms provided by the Regional Director for Region 19, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted in each of the facilities where unit employees are employed. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time after May 14, 2004.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

The allegations of the complaint not sustained herein shall be and they hereby are dismissed.

Dated, San Francisco, California, March 22, 2005.

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Clifford H. Anderson
Administrative Law Judge

[9] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

Accordingly,

We give our employees the following assurances.

WE WILL NOT Interrogate employees concerning employees union activities

WE WILL NOT create and maintain a mandatory employee dress code because of employees union activities

WE WILL NOT prohibiting smoking in the shop and company vans because of employees union activities

WE WILL NOT demote or discharge employees because of employees' union activities

WE WILL NOT in any like or related way violate the National labor Relations Act.

WE WILL withdraw and rescind our May 2004 no smoking rules.

WE WILL offer employee James Cooke immediate reinstatement to his former position, discharging if necessary any employee hired to replace him. Further, WE WILL make him whole for any and all loss of earnings and benefits he may have suffered, with interest.

Perfect Climate, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 Second Avenue, Federal Building, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.

THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC DOCUMENTS

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above.